obtain the network element from a carrier other than the ILEC. If the former, the FCC would have to establish and administer detailed rules delineating what does, and does not, qualify as self-providing a network element. If the FCC were to permit the carrier to obtain the non-ILEC network element from a competing LEC, the FCC would have to decide whether the competing LEC must be "facilities-based." If the FCC required the competing LEC to be facilities-based, no entry by new carriers would be possible in markets where competing facilities-based networks do not exist. Further, the FCC would have to develop and administer detailed rules defining what is, and is not, a facilities-based network element. If the FCC did not require the non-ILEC element to be facilities-based, new entrants under Section 251(c)(3) would just resell the ILEC's network elements to each other in order to satisfy the requirement of obtaining one network element from a carrier other than the ILEC. Given the obvious potential for protracted litigation, contested regulatory proceedings, delayed negotiations, and business uncertainty -- all leading to delayed or no local entry -- the FCC should reject the ILECs' proposed statutory interpretation.

Congress did not intend to rigidly restrict efficient competitive entry by insisting that a requesting carrier obtain at least one element from a carrier other than the ILEC. It was because most areas are characterized by only one network (the ILEC's network) that Congress saw a pressing need to adopt the 1996 Act in general and Section 251(c)(3) in particular. Congress and the FCC have recognized that the replication of network facilities will occur gradually over time, and in some cases carriers may rely upon the ILECs' monopoly network for years to come.[39] As CompTel noted in its comments, "Congress did not provide carriers the

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[39] E.g., Joint Explanatory Statement at 148; NPRM at 10 & 75.

tools to compete with the ILECs just to restrict carriers from using those tools only where competitive alternatives already exist."[40] The FCC should interpret Section 251(c)(3), according to its terms, to permit carriers to enter into co-carrier arrangements with ILECs to obtain any and all network elements necessary or useful to providing their own telecommunications services.

D. ILECs Cannot Impose Access Charges Upon Carriers Who Serve Customers Via Unbundled Network Elements

[NPRM, paras. 84 & 159-165.] Several ILECs suggest that they should be able to impose access charges upon carriers who have replaced them as the end-user's local exchange carrier through the purchase of network elements under Section 251(c)(3).[41] The Department of Justice has agreed with the FCC's tentative conclusion that this suggestion is openly hostile to the provisions and objectives of the 1996 Act. **[NPRM, para. 165.]** The Department observes that "[t]his argument of the ILECs, like others, would impede the ability of entrants to compete fully and on an equal footing in the provision of access."[42] Because a carrier who purchases network elements from an ILEC has fully compensated the ILEC for the economic costs of those elements, it would amount to a double recovery to award the ILECs access charges as well.[43] CompTel fully agrees with the Department that "[a]ccess charges would <u>not</u> have to be paid to

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40 CompTel Comments at 39.

41 <u>E.g.,</u> SBC Comments at 95.

42 DOJ Comments at 52).

43 DOJ Comments at 52 n.25.

ILECs for origination and termination of interexchange traffic to local customers who have switched to a competing local provider of access services."[44]

E. Section 251(c)(3) Authorizes Carriers To Combine <u>Elements To Provide Any Telecommunications Service</u>

[NPRM, paras. 85 & 90.] One of the most pernicious interpretations proffered by the ILECs is that carriers should not be able to combine network elements to provide services which the ILECs offer on a retail basis.[45] Like most of the ILECs' proposals, this one has absolutely no basis in the plain words used by Congress in writing Section 251(c)(3).[46] Indeed, it was to remove any possible doubt that new entrants could combine network elements into their own services that Congress inserted the last sentence in Section 251(c)(3): "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." Congress deliberately imposed no restrictions on the services that carriers could provide under Section 251(c)(3), and the FCC should affirm the plain-language meaning of that provision.

Were the FCC to adopt the ILECs' interpretation, it would permit the ILECs to defeat new entry through network elements under Section 251(c)(3) by the simple expedient of

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[44] DOJ Comments at 43; <u>see also</u> CompTel Comments at 39-40.

[45] <u>E.g.,</u> GTE Comments at 26; BellSouth Comments at 31-32.

[46] <u>E.g.,</u> Florida Public Service Commission Comments at 18 (entrants can purchase network elements to compete with ILECs' retail services)

offering network elements as retail services. At a minimum, the ILECs would be able to structure their retail tariffs to limit new entrants to whichever pricing methodologies -- the economic-cost methodology for Section 251(c)(3) versus the avoided-cost methodology for Section 251(c)(4) -- were more favorable to the ILECs and less favorable to new entrants. The Department of Justice correctly rejected the ILECs' proposal as antithetical to Congress' goal of new entry.[47] By contrast, interpreting Section 251(c)(3) according to its terms "comports with Congress' desire to offer new entrants a variety of ways to enter local markets and does not eliminate the usefulness of the resale provisions of Section 251(c)(4)."[48] The FCC should affirm that there are no limitations on the services which carriers can provide through the purchase of network elements under Section 251(c)(3).

The ILECs' claim that the resale and network element provisions are inconsistent is easily rebutted in those few instances where a network element and retail service are indeed equivalent.[49] In those rare instances where the retail service and network element are identical, then the pricing rules for the wholesale service and the network element would yield the same result -- unless the retail price were set above (or below) a competitive level. The sum of the TSLRIC of the underlying facility and the costs associated with offering the element as a service

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47 DOJ Comments at 48-49.

48 DOJ Comments at 49.

49 For equivalence to be achieved, two conditions must be satisfied: (1) the service must comprise the entire element, and (2) the element must provide only that service. Otherwise, the purchaser of the network element would either obtain less, or more than the retail service and no price comparison is valid.

(marketing, customer support, sales, etc.) should be the price of the service in the competitive environment that Congress sought to create. Congress did not adopt two mutually inconsistent pricing rules; rather, they recognized that services seldom consist of a single element, and that network elements seldom provide a single service.[50] However, in instances where the element and the service are identical, the pricing rules converge and any difference between the approaches will unleash competitive forces to drive prices to a competitive result.

Similarly, several LECs have complained that new entrants should not be able to "mix and match" network elements purchased under Section 251(c)(3) with local exchange services purchased at resale under Section 251(c)(4).[51] That activity is plainly pro-competitive, and there is nothing in the statute, as written by Congress, that prohibits competitive carriers from providing some services using ILEC network elements and other services using ILEC retail offerings. To the contrary, Congress drafted Section 251(c) to maximize the options for carriers to enter the local market, and it is fully consistent with that overriding objective for carriers to develop innovative new services through combinations of network elements and ILEC retail services.

F. Section 251(c)(3) Imposes An Affirmative Obligation Upon ILECs To Provide Network Elements So That Carriers Can Combine Them Into Services

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50 The elements underlying local exchange service, for instance, also provide exchange access service.

51 E.g., NYNEX Comments at 38.

[NPRM, paras. 79 & 90-91.] The FCC must adopt an explicit national policy under Section 251(c) requiring ILECs to develop automated PIC-like procedures which permit new entrants to turn up local customers as quickly, efficiently and inexpensively as ILECs can turn up long distance customers. Further, the FCC should require ILECs to provide the operational and back-office systems necessary for requesting carriers to purchase network elements and then combine such elements into telecommunications services of their own design. Section 251(c)(3) will be meaningless if ILECs can provide network elements so that they cannot feasibly be combined into competing telecommunications services, or if requesting carriers cannot turn up new customers for such services.

As CompTel predicted,[52] the ILECs in general, and NYNEX in particular, are taking the intransigent position that whether and how to combine elements into services is solely the responsibility of the requesting carrier.[53] While Section 251(c)(3) contemplates that the requesting carrier will identify the elements that will constitute its offering, they ignore that the provision expressly requires ILECs to provide network elements "in a manner" that permits carriers to establish competitive services. As such, ILECs may be required to perform the functions necessary to combine discrete network elements into a complete competitive carrier service. It is obvious by now that the ILECs will not fulfill their statutory obligation under the last sentence of Section 251(c)(3) unless the FCC expressly orders them to do so. The FCC should establish a clear national policy mandating full compliance with Section 251(c)(3), and

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52 CompTel Comments at 37-38.

53 E.g., NYNEX Comments at 36-38 & n.75.

clarify that the Bell Companies cannot enter the in-region interLATA market until they have fully complied with the statute and the FCC's policies under Section 251(c) by establishing the necessary mechanisms for new entrants to provide competing local services through the purchase of network elements.

G. The Statutory Impairment Standard Applies Only To Network Elements That Are Proprietary In Nature

[NPRM, para. 90.] Several ILECs interpret Section 251(d)(2)(B) to impose a general limitation on the availability of network elements under Section 251(c)(3) to those which would "impair" the ability of carriers to provide service if they were not provided.[54] That provision says no such thing. Section 251(d)(2) provides that ILECs need provide network elements which are proprietary in nature only if the failure to provide "such network elements" would impair a requesting carrier's ability to provide telecommunications services. The impairment applies only to proprietary network elements, not to all network elements. The FCC should not permit the ILECs to turn Section 251(d)(2)(B) into a source of contentious litigation and business uncertainty to delay new entry into the local market.

The FCC also should reject Ameritech's suggestion that a carrier is not impaired under Section 251(d)(2)(B) if it can purchase the network element as a retail service from an ILEC.[55] The impairment standard is specific to the provision of service through combinations of

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54 E.g., GTE Comments at 30-31. See also BellSouth Comments at 35 (arguing that a party seeking access to an unbundled element that is not necessary to avoid service impairment should have the burden of showing that the element still should be unbundled.)

55 See Ameritech Comments at 28.

network elements under Section 251(c)(3). It is the carrier's decision, not the ILEC, to identify the most efficient means of providing any competing service. If it is more efficient to resell an ILEC's retail service than to construct a service out of network elements, market conditions will see that the carrier does so.

III. THE FCC SHOULD NOT INJECT RESTRICTIONS INTO SECTION 251(C)(2) WHICH CONGRESS DID NOT EXPRESSLY DECREE

[NPRM, paras. 159-165.] As written by Congress, Section 251(c)(2) entitles carriers to obtain stand-alone exchange access through co-carrier arrangements with ILECs. The ILECs seeking to restrict "interexchange carriers" from entering into co-carrier interconnection arrangements can find no support in the words of the provision. Rather, they openly seek an interpretation that re-writes Section 251(c)(2) to comport with their own policy proposals (in this case, to protect their carrier-to-customer exchange access revenues). The FCC should reject those arguments because: (1) they conflict with the plain meaning of the words chosen by Congress; and (2) they would encourage endless litigation over what traffic is and is not subject to Section 251(c)(2). As Frontier Corp. (a USTA Board member) notes: "The Commission should make clear that all unbundled elements and interconnection services are available for purchase by all telecommunications providers for any lawful purpose, including the provision (or procurement) of interstate access services."[56]

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[56] Frontier Comments at iii.

A. Section 251(c)(2) Authorizes Carriers to Interconnect With ILECs On A Co-Carrier Basis To Obtain Stand-Alone Exchange Access

[NPRM, paras. 48-67.] Section 251(c)(2) states that "any requesting telecommunications carrier" may enter into a co-carrier interconnection agreement with an ILEC for the "transmission and routing of telephone exchange service and exchange access." The ILECs ask the FCC to pare down this provision to apply only to competing local facilities-based carriers, not to all carriers.[57] The words of Section 251(c)(2) repudiate that interpretation. All telecommunications carriers -- not just competing local carriers, and not just facilities-based carriers -- are entitled to route their exchange access traffic pursuant to co-carrier interconnection arrangements with ILECs.

Similarly, the FCC should reject the ILECs' argument that Section 251(c)(2) requires a requesting carrier to route both local exchange and exchange access, not local exchange or exchange access.[58] **[NPRM, para. 162.]** As the Department of Justice notes, "the language of Section 251(c)(2) plainly contemplates use of the interconnection to be afforded for exchange access as well as local exchange service."[59] In its comments, CompTel demonstrated that Section 251(c)(2) requires ILECs to offer interconnection for both local exchange service and exchange access, while enabling a requesting carrier to obtain interconnection for telephone

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57 E.g., NYNEX Comments at i-ii.

58 E.g., Pacific Comments at 78; USTA Comments at 60; NYNEX Comments at 11 & n.18.

59 DOJ Comments at 52 (emphasis in original).

exchange service only, for exchange access only, or for both, at its option.[60] That interpretation of "and" reflects the natural meaning of the word and the one Congress intended. The ILECs' interpretation, as the Department of Justice recognizes, appears designed to impede the ability of new entrants to enter the local market on an equal footing with the ILECs as Congress desired.[61]

The ILECs want to narrow Section 251(c)(2) by excluding "interexchange carriers" in order to protect their exchange access revenue stream. The ILECs are not just seeking to exempt their exchange access revenue stream from the 1996 Act; they are seeking to erect entry barriers around the local market by strictly limiting the types of carriers who can have access to cost-based co-carrier interconnection arrangements under Section 251(c)(2). If the ILECs are successful in persuading the FCC to write "interexchange carriers" out of Section 251(c)(2), they would remove an important source of potential local competition.

The ILECs' argument that the co-carrier model under Section 251(c)(2) should not supersede the carrier-to-customer access charge regime under Part 69 is a straw man. **[NPRM, para. 161.]** It should now be clear that Congress adopted Section 251(c)(2) to supplant the traditional carrier-to-carrier access charge regime, but not carrier-to-customer relationships.

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[60] CompTel Comments at 62-63.

[61] DOJ Comments at 52.

While carriers will be able to replace Part 69 access arrangements with interconnection under Section 251, non-carriers will continue to purchase ILEC access services through intrastate and interstate access tariffs. The Department of Justice observed:

> "Permitting the use of interconnection . . . for use in providing competitive exchange access is certainly not inconsistent with Section 251(g) of the Act as some LECs have argued. That section only preserves the rights of interexchange carriers to equal access under the previously existing rules until the Commission issues superseding regulations. This section clearly is not intended to limit . . . the provision of exchange access by new entrants which the statute seeks to encourage."[62]

Sections 251(g) and (i) of the 1996 Act -- and Section 201 of the 1934 Act -- simply bear no relevance to the proper interpretation of Section 251(c)(2)

The ILECs argue that any loss of revenues they receive today through the migration of traffic to interconnection arrangements under Section 251(c)(2) will present public policy issues for the FCC and state commissions.[63] USTA even throws dark hints, as CompTel

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62 DOJ Comments at 53 n.26.

63 E.g., NYNEX Comments at 59.

predicted, that ILECs will attempt to make up their revenue shortfalls through local rate increases.[64] CompTel does not dispute that Section 251(c) may present public policy issues for the FCC and state commissions. However, those issues can and should be addressed and resolved on their own terms as matters of policy and regulation; they do not rise to the level of statutory interpretation. The FCC should apply Section 251(c)(2) according to the plain meaning of the words chosen by Congress, and adopt whatever regulations or policies it feels are necessary to address the revenue impact.

As noted above and in its comments, CompTel proposed an interim plan offering a clean separation between critical issues of statutory interpretation and short-term transitional impacts upon ILECs or consumers.[65] CompTel's interim plan is contingent upon the FCC's interpretation of Sections 251(c) and 252(d) to entitle carriers to obtain stand-alone exchange access for their own long distance services based on economic costs, and the FCC's adoption of strict TSLRIC pricing as a uniform national standard for such arrangements. During an interim period ending with the FCC's completion of the universal service proceeding in CC Docket No. 96-45, the FCC could grant a blanket waiver of TSLRIC pricing for stand-alone exchange access so that ILECs would continue to provide exchange access to long distance carriers, as they do

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[64] USTA Comments at 56; see also U S West Comments at 9 (recognizing that its call for higher local rates would be "controversial").

[65] CompTel Comments at 81-87 (Section V).

today, pursuant to their intrastate and interstate carrier-to-customer access charge tariffs.[66] Any Bell Company who takes advantage of the blanket waiver would not be able to enter the in-region interLATA market until it introduced TSLRIC pricing under Sections 251(c) and 252(d). This interim plan would quell any possible fears that the 1996 Act would cause local rate hikes, while giving the FCC sufficient time to adopt whatever policies are necessary to address the 1996 Act's revenue impact on the ILECs.

CompTel's interim plan fully addresses the ILECs' expressed concerns. U S West recognizes that "Section 251 pricing must be harmonized with interstate access pricing, both long and short term," and that the FCC should continue to require carriers to obtain exchange access through its carrier-to-customer access charge tariffs "only for a short time."[67] USTA recognizes that "the Commission should eventually move to a system in which all interconnectors . . . pay common prices for common services," but insists that ILECs should continue receiving excess revenues through access charges until access reform can be completed.[68] GTE agrees that "state and federal regulators must rationalize pricing structures for all users of the ILEC's network" such that "pricing does not discriminate based on the identity of the access customer."[69] SBC

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66 As CompTel noted in its comments (at 86-87), the interim plan would not apply to situations where a carrier replaces an ILEC as the end-user customer's local exchange carrier through the purchase of network elements under Section 251(c)(3).

67 U S West Comments at 61, 62. Significantly, U S West concedes that the industry must move to unseparated pricing, although it does not offer any proposals on how this transition should take place.

68 USTA Comments at 52.

69 GTE Comments at 72.

supports the FCC's "stated goal of obtaining in the future equivalent pricing for functionally equivalent services (i.e., 'minute is a minute' pricing)."[70] If these and other ILECs are serious in supporting the removal of artificial distinctions among carriers "as soon as" the FCC reforms access charges and completes the universal service proceeding, CompTel's interim plan should eliminate any remaining objections to the proper interpretation of Sections 251(c) and 252(d)

B. Section 251(c)(2) Does Not Require A Requesting Carrier To Make An Exchange Access "Offering"

[NPRM, paras. 159-165.] The FCC sought comments on its tentative conclusion that carriers could not obtain exchange access from ILECs pursuant to co-carrier interconnection arrangements under Section 251(c)(2) unless they "offer[]" exchange access to others. **[NPRM, para. 161.]** In its comments, CompTel showed that the FCC is misreading Section 251(c)(2), which requires the ILEC, not the requesting carrier, to "offer[]" exchange access.[71] By writing a broader "offering" requirement into the statute, the FCC would effectively limit interconnection under Section 251(c)(2) to local exchange carriers, not "telecommunications carriers" as Congress intended.[72]

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70 SBC Comments at 59.

71 CompTel Comments at 49-52.

72 CompTel also pointed out that carriers satisfy the "offering" requirement when they offer and provide exchange access as an integral part of long distance service to their end-user subscribers. CompTel Comments at 51-52.

Further, CompTel demonstrated that there is no feasible interpretation that would prevent any long distance carrier -- regardless whether it "offer[s]" exchange access -- from obtaining stand-alone exchange access indirectly through co-carrier interconnection arrangements under Section 251(c)(2). The market will develop lawful business structures and arrangements whereby qualifying carriers obtain exchange access from ILECs to "offer" it on a stand-alone basis to long distance carriers. Without changing that outcome, the FCC's proposed interpretation would only engender pointless litigation and regulatory proceedings, while imposing unnecessary costs on the industry and delaying competitive entry. Congress did not intend for "telecommunications carriers" to jump through those hoops to obtain co-carrier interconnection arrangements under Section 251(c)(2).[73]

Although the ILECs predictably support the FCC's interpretation, they offer virtually no analysis or independent support. Several ILECs point out, as CompTel noted,[74] that the Senate bill, S. 652, expressly required requesting carriers to obtain interconnection for the purpose of providing exchange access service. However, Congress re-wrote that provision in conference committee to remove the requirement that carriers obtain interconnection for the purpose of providing exchange access. If any inference can be drawn from this action, it is that Congress desired to remove the eligibility restriction to ensure that all "telecommunications carriers" qualify for co-carrier interconnection arrangements under Section 251(c)(2).

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73 With all due respect, CompTel submits that the FCC would be playing a losing game if it accepts USTA's invitation to "rigidly police the boundaries" between exchange access and Section 251(c). USTA Comments at 52; id. at 65 n.55.

74 CompTel Comments at 50 n.45.

Although the Department of Justice argues that the FCC's approach is "consistent with the promotion of competition in local exchange and exchange access markets,"[75] the Department cautions against imposing "customer and use restrictions" to force carriers to offer exchange access to others but not to themselves.[76] Such restrictions would be both "unnecessary and anticompetitive."[77] Although CompTel firmly believes that the FCC's proposed "offering" requirement is counterproductive and inconsistent with the plain words of the statute, CompTel agrees with the Department that, at a minimum, view that carriers who enter into co-carrier arrangements under Section 251(c)(2) to "offer[]" stand-alone exchange access to others should be entitled to supply exchange access for their own long distance offerings as well.

C. Section 251(c)(2) Does Not Apply To The Mere "Physical Linking" Of Facilities

[NPRM, paras. 53-54.] Numerous ILECs argue that Section 251(c)(2) should be construed as applying solely to the mere "physical linking" of network facilities,[78] but that reading does not square with the plain words of the provision.[79] Section 251(c)(2) applies not just to network interconnectivity, but to the "transmission and routing of telephone exchange

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75 DOJ Comments at 42.

76 DOJ Comments at 43-44.

77 DOJ Comments at 44.

78 E.g., U S West Comments at 11; BellSouth Comments at 15. See also MFS Comments at 15.

79 See CompTel Comments at 66-67

service and exchange access." It is impossible to limit Section 251(c)(2) to the mere physical linking of networks without reading that phrase out of the statute entirely. Further, those ILECs who argue that the term "interconnection" inherently applies only to network interconnectivity should read the title of Section 251 -- "Interconnection." Congress plainly did not use the term "interconnection" in the narrow, technical sense alleged by the ILECs. The argument that Section 251(c)(2) applies only to network interconnectivity is just one in a series of arguments woven by the ILECs out of whole cloth in an all-out effort to denude Section 251(c).

IV. THE FCC SHOULD ADOPT TSLRIC AS A MANDATORY NATIONAL COSTING STANDARD TO IMPLEMENT THE REQUIREMENT FOR RATES BASED ON ECONOMIC COSTS UNDER SECTIONS 251(C) AND 252(D)

A. A TSLRIC Standard Is The Only Available Pricing Methodology Based On Economic Costs

[NPRM, paras. 117-157.] In Sections 251(c) and 252(d), Congress required the rates for interconnection and network elements to be based upon economic costs. The FCC must adopt the TSLRIC methodology because it is the only pricing standard that the record in this proceeding shows as being fully consistent with the statutory mandate.[80] The Department of Justice recommends adopting a TSLRIC methodology as adjusted to permit the recovery of forward-looking joint and common costs associated with operating the network.[81] Significantly,

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80 It is worth noting that Frontier Corporation, a USTA Board member, supports TSLRIC pricing under Sections 251(c) and 252(d). Frontier Comments at 20-23; see also Wyoming Public Service Commission Comments at 36 (supporting TSLRIC standard for all wholesale and retail services).

81 DOJ Comments at 27-33.

the Department does not recommend adjusting TSLRIC rates to reflect the costs that are joint and common between network and retail services, and it opposes permitting the ILECs to recover embedded or historical costs through its rates for interconnection and network elements. Consistent with its comments,[82] CompTel strongly endorses the Department's recommendation.

As expected, the ILECs ask the Commission to refrain from adopting an explicit national standard or, if a standard is adopted, to guarantee that the ILECs recover 100% of their historical, embedded, ancillary and residual costs -- in short, "all costs."[83] The ILECs do not make a serious attempt to square their proposal with the statutory prescription in Section 252(d) against "rate-based" approaches, nor can it be. Sections 251(c) and 252(d) flatly prohibit any backward-looking cost methodology. Incredibly, the ILECs still possess the mind-set that they are entitled to a government-backed guarantee that they will recover 100% of their current revenue stream.[84] The 1996 Act obliterated guaranteed revenue streams for all participants, and it would violate the provisions of the legislation and Congress' objective to adopt a backward-looking standard that insulated the ILECs from competitive market conditions.

The Department of Justice catalogued the compelling reasons why the FCC should adopt a TSLRIC standard:[85]

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[82] CompTel Comments at 67-80.

[83] Ameritech Comments at 62, 71 & 87; see also USTA Comments at 38-39 ("total costs").

[84] As CompTel noted in its comments (at 68), the ILECs' current revenue stream bears no relationship to their historical or embedded costs, however defined, due to price cap regulation and other factors.

[85] DOJ Comments at 28-31.

1. TSLRIC pricing simulates the prices that would result from competitive market conditions, thereby restraining the ILECs' market power even where competition does not yet exist.

2. TSLRIC pricing sends economically efficient signals to carriers seeking to enter the local market, thereby ensuring the "right" investment incentives and avoiding skewed "make or buy" decisions

3. The TSLRIC standard will lead to lower prices for interconnection and network elements, ultimately resulting in lower prices for consumers.

4. TSLRIC pricing will forestall inefficient cross-subsidies which the ILECs will have strong incentives to implement in order to disadvantage new entrants if they are permitted to recover their historic costs through interconnection and network element rates.

CompTel agrees with the Department's endorsement of a TSLRIC standard because it is "so well suited to the statutory goal of promoting competition, and because alternative pricing standards entail a substantially greater risk of impeding, rather than promoting, the emergence of competition."[86]

B. Adopting TSLRIC Pricing Does Not Involve An Unconstitutional Taking Without Just Compensation

[NPRM, paras. 117-157.] Several ILECs argue that a TSLRIC standard for interconnection under Section 251(c)(2) and network elements under Section 251(c)(3) would embody a taking of private property without just compensation in violation of the Fifth Amendment.[87] This argument is specious and should be rejected.

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86 DOJ Comments at 33.

87 E.g., U S West Comments at 24-35.

First, Sections 251(c)(2) and (c)(3) do not embody a "taking" of private property. The ILECs rely upon cases where the property rights of private individuals were infringed upon by a physical occupation.[88] This matter involves regulated common carriers whose properties are dedicated to public use. On many occasions the FCC has ordered common carriers to engage in interconnection and to unbundle services and facilities[89] without implementing a "taking" of private property.

In analogous industries, the courts have held that similar regulations do not constitute a "taking" under the Fifth Amendment. In Metropolitan Transportation Authority v. ICC, the court stated that an "[ICC] order directing one carrier to receive and transport the cars of a second carrier over its terminal is not a taking."[90] The court pointed out that "requiring one public utility to give another operative rights over its facilities, subject to an obligation to pay reasonable reimbursement, in order to deliver service to the public . . . fits more into the regulatory rather than the taking mode as those terms have traditionally been applied by American courts."[91] By the same reasoning, the co-carrier regime for interconnection and network elements under Section 251(c) does not embody a "taking" under the Fifth Amendment.

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88 E.g., Nollan v. California, 483 U.S. 825 (1987); Loretto v. TelePrompTer Manhattan CATV Corp., 458 U.S. 419 (1982).

89 E.g., Expanded Interconnection with Local Telephone Company Facilities, 9 FCC Rcd. 5154 (1994); Expanded Interconnection with Local Telephone Company Facilities, 9 FCC Rcd. 2718 (1994).

90 792 F.2d 287, 296 (2d Cir. 1986).

91 Id. at 297. In addition, there is no "taking" where the use of the property is in exchange for a regulatory benefit. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); see also Nollan v. California, supra, 483 U.S. at 825 (state commission could condition grant of

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Second, assuming for the sake of argument that Sections 251(c)(2) and (c)(3) embody a taking, the FCC's adoption of a TSLRIC standard, as required by Congress in Section 252(d), inherently involves "just compensation." It is well-settled that regulation of rates regarding private property devoted to public use is constitutionally permissible.[92] When an agency sets rates for regulated entities, "all that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level."[93] A rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired."[94]

Even in cases where an agency compels a regulated entity to provide service at a loss, the Fifth Amendment is not necessarily violated. As one court noted, "there is no general principle that every component of an integral whole of a utility service must show a profit."[95] In a case where a common carrier was required to transport passengers over certain of its lines at set rates, the Supreme Court held that the correct test was the effect of the regulation upon all the

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rebuilding permit on owner's grant of easement as lawful land-use regulation if substantial government purposes would justify denying permit in absence of easement).

92 E.g., FCC v. Florida Power Corp., 480 U.S. 245, 253 (1987).

93 FPC v. Texaco, Inc., 417 U.S. 380, 391-92 (1974).

94 Duquesne Light Co. v. Barasch, 488 U.S. 299, 307 (1989) (quoting Covington & Lexington Turnpike Road Co. v. Sanford, 164 U.S. 578, 597 (1896)).

95 Brooklyn Eastern Dist. Terminal v. United States, 302 F. Supp. 1095, 1100 (E.D.N.Y. 1969).

lines, not just the particular lines in question. The Court held that the carrier "cannot claim the right to earn a net profit on every mile, section or other part . . . into which it might be divided."[96]

Based upon this precedent, a TSLRIC standard for interconnection and network elements under Section 251(c) cannot possibly be regarded as the confiscation of private property. By definition, this standard fully compensates the ILECs for the economic costs (including a reasonable profit) of providing interconnection and network elements. To the extent the ILECs incur, or have incurred, costs of providing interconnection and network elements which they believe are not recovered under TSLRIC pricing, the ILECS must show that they are unable to recover such costs through other portions of their business, including their retail operations. The ILECs have made no such showing. They have not even purported to identify the excess costs allegedly not recovered through TSLRIC prices, shown that they are properly allocable to interconnection and network elements, or demonstrated that incurring such costs was efficient and prudent.[97] In any event, given that the FCC has ongoing proceedings to determine whether the ILECs or other entities qualify for universal service amounts, it is impossible for the ILECs to prove that TSLRIC pricing is per se confiscatory. Therefore, the FCC should reject the

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96 Puget Sound Traction, Light & Power Co. v. Reynolds, 244 U.S. 574, 581 (1917); see also Baltimore & Ohio R.R. v. United States, 345 U.S. 146, 148 (1953) (rate ceiling not unconstitutional so long as it does not cause railroad to lose money on its overall business).

97 To the extent the ILECs incurred costs inefficiently, or did so to build excess capacity or to promote other interests beyond the provision of interconnection and network elements to requesting carriers, they are not entitled to "just compensation" under the Fifth Amendment.

ILECs' assertions that TSLRIC pricing for interconnection and network elements under Sections 251(c) and 252(d) is a violation of the Fifth Amendment

C. The FCC Should Not Adopt The ECPR

[NPRM, paras. 147-148.] Several ILECs have argued that the FCC should adopt the so-called efficient component pricing rule ("ECPR")[98] In the NPRM, the FCC tentatively, and correctly, rejected the ECPR.[99] **[NPRM, para. 148.]** The ECPR would allow ILECs to retain monopoly rents and thereby protect them from disciplinary market forces, precisely the opposite result from what Congress intended.[100] In situations where the ILECs have the perspective of new entrants rather than the incumbent monopolist, they oppose the ECPR. For example, BellSouth New Zealand submitted a discussion paper to the New Zealand Government in September, 1995 in opposition to ECPR. BellSouth concluded that the ECPR "creates very significant allocative and dynamic inefficiencies" and "acts to perpetuate high prices, limit entry, restrict, prevent and even eliminate competition as well as retard innovation."[101] The ECPR should not be adopted because it does not comport with the statutory mandate for interconnection and network element rates based on economic costs.

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98 E.g., GTE Comments at 63 n. 92 & Att.3; Ameritech Comments at 92; SBC Comments at 75.

99 See Massachusetts Attorney General Comments at 6-9 (rejecting ECPR).

100 See AT&T Comments, App. C at 8 (conclusion of Professors Baumol, Ordover and Willig that "applying ECPR to the existing rate structure would result in component prices that lock in the ILECs' monopoly profits and inefficiencies").

101 See "Regulation of Access to Vertically-Integrated Natural Monopolies," A Discussion Paper, BellSouth New Zealand, September, 1995, at 16 & 67.

V. THE FCC SHOULD ADOPT THE RULES NECESSARY TO ENSURE THAT CARRIERS CAN OBTAIN LOCAL EXCHANGE SERVICE AT MEANINGFUL WHOLESALE RATES WITHOUT RESTRICTIONS

[NPRM, paras. 172-188.] The FCC should not underestimate the importance of local exchange resale under Section 251(c)(4) at meaningful wholesale rates, and without unreasonable restrictions, to a competitive full-service marketplace.[102] The Department of Justice recognized the instrumental role that local exchange resale will play in achieving Congress' objectives: "[T]he availability of wholesale local exchange service for resale is crucial for the development of local competition and the preservation of competition in interexchange markets."[103] Local exchange resale is necessary for both interim entry (pending the build-out of facilities or the purchase of network elements to be combined into services) and for permanent entry (where other forms of entry are infeasible or economically inefficient for the carrier). The FCC must take principally three actions to implement Section 251(c)(4): First, it must require ILECs to remove all retail-related costs from their wholesale rates. Second, it must adopt an express policy under Section 251(c) prohibiting ILECs from imposing any restrictions upon local exchange resale other than the single restriction which Congress permitted state commissions to impose. Third, the FCC must require ILECs to establish the operating systems necessary for the effective implementation of co-carrier arrangements.

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102 See CompTel Comments at 88-91.

103 DOJ Comments at 53-54.

First, CompTel demonstrated in its comments that Sections 251(c)(4) and 252(d)(3) require the removal of all retail-related costs from the ILECs' retail local exchange rates.[104] A carrier who purchases local exchange service under Section 251(c)(4) is a wholesale customer, not a retail customer. It would directly contravene the statutory requirement of a "wholesale" rate, as well as its directive to remove all avoided retail costs, for the ILECs to keep any retail-related costs, including overheads attributable to retail services, in the wholesale local exchange rate. The FCC should establish a methodology based upon USOA accounts and existing ARMIS data to guide states in prescribing the wholesale rates mandated by Sections 251(c)(4) and 252(d)(3).[105] In establishing this methodology, the FCC should keep in mind that the larger ILECs will routinely obtain wholesale rate reductions of 50-80% in the long distance market.

Second, the ILECs have already shown that they will make every effort to denude Section 251(c)(4) with a raft of restrictions and conditions upon local exchange resale. The ILECs' proposals include: (i) the exclusion of promotional rates or trial services;[106] (ii) unfettered discretion to withdraw services;[107] (iii) the exclusion of grandfathered or customer-

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104 CompTel Comments at 94-96.

105 CompTel Comments at 96-99.

106 E.g., USTA Comments at 72; but see Colorado Public Utilities Commission at 52, 57-58 (no restrictions upon promotions and discounts).

107 E.g., GTE Comments at 48; but see Florida Public Service Commission Comments at 37 (ILECs should not be permitted to withdraw service to thwart resale).